No. 11,865

IN THE

United States Court of Appeals

For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.
(a corporation),
Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED
(a corporation),
Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR HAWAIIAN AIRLINES, LIMITED, APPELLEE.

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OPINIONS BELOW.

The Findings of Fact and Conclusions of Law (R. 13-15) of the District Court are not reported; the opinion of the District Court on the temporary injunction is reported at 73 F. Supp. 68.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii was founded (R. 15) upon Section 1007(a) of the Civil Aeronautics Act of 1938,

as amended, 52 Stat. 1027(a), 49 U.S.C. 647(a) and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended; 48 U.S.C. Sections 642, 642a.

The jurisdiction of this Court rests upon Section 128 of the Judicial Code, amended, 28 U.S.C. Sections 1291, 1293 and 1294. The decree of the District Court enjoining appellant's illegal operations was entered on November 10, 1947 (R. 15). Notice of appeal was filed November 20, 1947 (R. 23).

STATUTORY PROVISIONS.

The relevant portions of the Civil Aeronautics Act of 1938 as amended,[1] and of the Economic Regulations of the Civil Aeronautics Board are set forth in the Appendix.

STATEMENT OF THE CASE.

Hawaiian Airlines, Limited, appellee, brought action in the District Court against appellant to enjoin it from operating as a scheduled air carrier engaged in air transportation in violation of Section 401(a) of the Civil Aeronautics Act of 1938 as amended.[2] (R. 3). At the conclusion of the trial on the merits the Dis-

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[1] 52 Stat. 973; 49 U.S.C. 401, herein called the "Act". By Reorganization Plan No. IV, 5 Fed. Reg. 2421 the "Civil Aeronautics Authority" became the "Civil Aeronautics Board" herein referred to as the "Board".

[2] 49 U.S.C. Sec. 481(a).

trict Court found that Hawaiian Airlines, Limited, was the holder of a certificate of public convenience and necessity issued by the Board authorizing it to engage in air transportation within the Territory of Hawaii (R. 13); that appellant, Trans-Pacific Airlines, Ltd. (Trans-Pacific), was an air carrier within the meaning of the Act, engaged in air transportation within the Territory of Hawaii and had conducted a regular scheduled daily service as a common carrier between points within the territory from January 1, 1947 to September 11, 1947 without having a certificate of public convenience and necessity from the Board (R. 13); that Trans-Pacific held a Letter of Registration issued to it by the Board, but did not operate within the allowable limits of Section 292.1 of the Economic Regulations (R. 13).

The District Court concluded that Hawaiian Airlines, Limited, was damaged by Trans-Pacific; that Trans-Pacific did not operate within the allowable limits of Economic Regulations 292.1 and that it did not operate under any exemption pursuant to Section 416 of the Act or any rule, regulation or order of the Board. Accordingly the District Court held that Trans-Pacific during the period January 1, 1947, to September 11, 1947, was in continuous and repeated violation of Section 401(a) of the Act to the damage of Hawaiian Airlines, Limited, and that since the court had jurisdiction to enjoin violations of Section 401(a) of the Act, it could and did order the entry of a decree permanently enjoining the unlawful operations of appellant (R. 14).

Pursuant to the Findings of Fact and Conclusions of Law, a final decree was entered on November 10, 1947 (R. 15), and a permanent injunction pursuant to the decree issued (R. 19). The court retained jurisdiction to modify the decree in the event the Board should modify or rescind its regulations.

The facts of appellant's daily scheduled air transportation without a certificate of public convenience and necessity is not challenged here. The sole issue raised on this appeal is the jurisdiction of the District Court to entertain the proceeding.

QUESTION PRESENTED.

This appeal presents a single question:

Did the District Court have jurisdiction to restrain appellant's violations of Section 401(a) of the Act pursuant to the authority conferred on it by Section 1007(a)?

For purposes of clarity it will be treated in two parts:

(a) Did appellant's Letter of Registration issued pursuant to Economic Regulations 292.1 exempt it from the provisions of Section 401(a) of the Act even though appellant was not an irregular air carrier as defined in the regulation?

(b) Was the District Court competent to determine whether appellant's operations were "irregular" within the meaning of Economic Regulations 292.1 of the Civil Aeronautics Board?

SUMMARY OF ARGUMENT.

The District Court had express statutory jurisdiction to enjoin appellant's illegal scheduled operations by virtue of Section 1007(a) of the Act. Appellant was not exempt from the provisions of Section 401(a) of the Act prohibiting air carriers from engaging in air transportation without holding a certificate of convenience and necessity.

Section 292.1 of the Economic Regulations of the Civil Aeronautics Board (by virtue of which appellant claims an exemption) exempts only Irregular Air Carriers from certain provisions of Title IV of the Act, including Section 401(a). The mere fact that appellant registered with the Civil Aeronautics Board pursuant to the terms of this regulation, and received a Letter of Registration, does not in and of itself exempt appellant from the provisions of Section 401(a). Appellant must bring itself within the exempted class of carriers before it can claim exemption.

The District Court was competent to construe Section 292.1 of the Economic Regulations to determine whether appellant was in fact an irregular air carrier. This issue did not present a question requiring the court to defer to the jurisdiction of the Civil Aeronautics Board. Having determined that appellant was not an irregular air carrier, the District Court properly exercised its jurisdiction under Section 1007(a) of the Act to enjoin its operations as an air carrier engaged in air transportation without holding a certificate of convenience and necessity.

ARGUMENT.

I.

SECTION 292.1 OF THE ECONOMIC REGULATIONS EXEMPTS FROM CERTAIN PROVISIONS OF THE ACT ONLY THE IRREGULAR OPERATIONS OF "IRREGULAR AIR CARRIERS" AS THEREIN DEFINED.

Section 401(a) of the Act[3] provides in part that:

> No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Pertinent terms are defined in Section 1,[4] as follows:

> (2) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation;
>
> (10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft;
>
> (21) 'Interstate air transportation' * * * means the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, * * *
>
> (a) * * * places, in the same * * * Territory * * *.

Trans-Pacific was an air carrier engaged in air transportation without holding a certificate of convenience and necessity. In the absence of further

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[3] 49 U.S.C. Sec. 481(a).
[4] 49 U.S.C. Sec. 401.

facts, then, the operations of Trans-Pacific as a common carrier by air would be unlawful under Section 401(a) and could be enjoined at the suit of any party in interest under the express grant of jurisdiction contained in the Act.[5] That section provides that——

Judicial Enforcement

Jurisdiction of Court

> (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder * * * the Board, its duly authorized agent, or *in the case of a violation of section 401(a) of this Act, any party in interest,* may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, * * *; and *such court shall have jurisdiction to enforce obedience thereto by a writ of injunction* * * *. (Emphasis supplied.)

Trans-Pacific relies on Section 292.1 of the Economic Regulations[6] to relieve it from conducting its daily scheduled service without having a certificate authorizing such air transportation as is required by Section 401 of the Act. This regulation was promulgated under the authority of Section 416(a) and (b) of the Act which empowers the Board to——

> * * * establish such just and reasonable classifications or groups of air carriers * * * as the nature of the services * * * shall require * * *;[7]

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[5] 49 U.S.C. Sec. 647(a).
[6] 12 Fed. Reg. 3076, May 10, 1947.
[7] 49 U.S.C. Sec. 496(a).

and to——

> * * * exempt from the requirements of this title or any provision thereof, * * * any air carrier or class of air carriers * * *.[8]

Section 292.1(b) of the regulation establishes a classification of non-certificated carriers designated as "irregular air carriers". An irregular air carrier is defined as an air carrier (1) which does not hold a certificate of convenience and necessity (2) which engages in interstate or overseas air transportation, and (3)——

> * * * which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. * * *

Section 292.1(c) of the regulation provides:

> *Exemptions*—(1) General. Except as otherwise provided in this section, irregular air carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as

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[8] 49 U.S.C. Sec. 496(b)(1).

> amended, other than the following: (Exceptions not here pertinent.)

In this regulation, the Board by administrative action, after hearing[9] established a classification of air carriers and exempted that class from the requirement of obtaining a certificate of public convenience and necessity. As a condition precedent to enjoyment of the exemption, irregular air carriers had to apply for and receive a Letter of Registration issued by the Board.[10] The prescribed form of application contains no information concerning the extent of the operations of the applicant, upon which a determination can be made as to the regularity or irregularity thereof.[11] The Board conducts no hearing before issuing such letters. The letter itself is not an order of the Board adjudicating its holder an irregular air carrier. By its terms it carefully states:

> This is not a certificate of public convenience and necessity and is merely evidence of registration (R. 80).

The applying carrier determines for itself whether or not it falls within the exempted class. The non-scheduled exemption order was adopted in 1938. It was not until after the *Investigation of Non-Scheduled Air Services* in 1946,[12] that the registration provision was put into effect. Its purpose was to facili-

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[9]Investigation of Non Scheduled Air Services, Docket No. 1501, 6 CAB 1049 (1946).

[10]Sec. 292.1(d)(1) and (2), 12 Fed. Reg. 3078.

[11]Ibid.

[12]6 CAB 1049.

tate the gathering of data to "provide a firmer foundation for permanent regulation".[13]

Trans-Pacific is in error in asserting that because it has registered under Regulation 292.1, it is for all purposes exempt from the effect of Section 401(a) of the Act, requiring air carriers engaged in air transportation to obtain a certificate of convenience and necessity. To be sure, certain air carriers are exempt, but in order to enjoy the exemption they must bring themselves within the class of irregular air carriers to which the regulation is directed. If they fail to do so (as appellant failed in this case) they are without the scope of the exempting regulation and must hold a certificate or a special exemption if they would continue to operate. Lacking such authority, an air carrier will be operating in violation of Section 401(a) of the Act and may be enjoined in the District Court pursuant to the express command of Section 1007(a) of the Act. Upon the facts found by the District Court, Trans-Pacific did not bring itself within any exemption.

If, as Trans-Pacific seems to argue (Brief, p. 29), the Letter of Registration issued in this case be considered an order specifically exempting Trans-Pacific from the requirement of obtaining a certificate of convenience and necessity, the Board's action would be beyond the bounds of its statutory power and illegal. As previously stated, Section 416(b)(1) empowers the Board to exempt from certain sections of the Act "any air carrier or class of air carriers" but only——

[13]Id. p. 1056.

> if it finds that the enforcement * * * would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

Assuming that the establishment of a class of irregular air carriers as defined in the regulation is reasonable and that the prerequisite findings were made before exemption of that class, the Board has made no finding that Trans-Pacific is an irregular air carrier, and that the enforcement of the Act would be unduly burdensome to it and not in the public interest. Therefore, if the court should hold that the mere issuance of a Letter of Registration is tantamount to specific exemption it must disregard the express limitations on the exempting power in Section 416. Further, such Board action would be contrary to the Congressional mandate in Section 401(a) requiring certification of all common carriers by air.

Trans-Pacific points to certain other provisions in Section 292.1 of the regulation as indicating that the Letter of Registration exempts them entirely from Section 401(a) of the Act. Section 292.1(d)(2) provides for expiration of the Letter of Registration after a finding by the Board that enforcement of Section 401 would be in the public interest and "would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers."

This argument is circular. Our concern is whether Trans-Pacific was an irregular air carrier. The above

section authorizes the Board to rescind the exemption of irregular air carriers but does not lend credence to the assertion that all who hold such letters are *ipso facto* exempt as falling within that class.

Similarly, Section 292.1(d)(4) allows suspension and Section 292.1(d)(5) authorizes revocation of Letters of Registration. But these sections obviously are designed to grant the Board authority to suspend or revoke the exemption of an irregular air carrier if that carrier has violated the Act or regulations or if the Board finds it necessary in the public interest. A Letter of Registration is a condition precedent to an air carrier operating as an irregular air carrier, so that revocation or suspension of it will prevent operation. But an air carrier cannot conduct regularly scheduled operations without a certificate of convenience and necessity merely because it has registered as an irregular air carrier.

The Civil Aeronautics Board acting on its own initiative investigated two purportedly nonscheduled airlines, and finding that they were in fact operating a regular service, held (1) that their operations were not nonscheduled within the meaning of Section 292.1 of the Board's Economic Regulations, and that therefore (2) they had failed to comply with Section 401(a) of the Act by engaging in air transportation without having in force a certificate issued by the Board. As the Board said in *Page Airways:*

> The final question for determination here is whether the pattern of service that characterized respondent's operations was such as to constitute

> it a scheduled air carrier not within the explicit exemption provided for in the above regulation.[14]

It seems clear that a carrier, to take advantage of the exemption must prove that it falls within the exempt class. Mere registration under the Regulation (based on the carrier's individual judgment as to whether it is exempt) will not in and of itself confer the exemption.

In a case decided by the Board on October 13, 1948,[15] the entire effect of Regulation 292.1 was reviewed. Certain air carriers holding Letters of Registration sought an additional exemption under Section 416(b) of the Act to permit scheduled operations. Their plan was to operate a low cost coach service which, they alleged, would develop new classes of traffic and would not compete with certificated airlines. In denying the exemption, the Board first looked to Section 416 of the Act and found that it had no statutory authority to grant exemption of the type sought.

> There is nothing in the provisions of Section 416 which empowers the Board to authorize the establishment of air transportation service without meeting the requirements of Section 401 of the Act, unless there is a direct showing that enforcement of the provisions of that section would be an undue burden on the air carrier and is not in the public interest * * *. There is nothing in

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[14]Page Airways, Inc., Investigation, 6 CAB 1061, 1067 (1946); Trans-Marine Airlines, Inc., Investigation, 6 CAB 1071 (1946).

[15]Standard Air Lines, Inc.—Exemption Request: Docket No. 3430 et al., 2 CCH Av. L. R. par. 21,125; 17 L.W. 2173.

> the Act or its legislative history to justify the Board in by-passing or ignoring the certification provisions of Section 401 of the Act by authorizing extensive new operations which * * * are neither unusual as to circumstances nor limited in extent.

The Board reiterated the standards of irregular service which it had promulgated in the *Investigation of Non-Scheduled Air Services,*[16] and went on to say that:

> Any operations which are being conducted by these carriers beyond those authorized by the Letters of Registration, issued under Section 292.1 of the Economic Regulations, are being conducted at their own risk of violating the Act and the Board's regulations. * * * Clearly * * * the Board did not intend to authorize anything more than irregular and infrequent service.

Here is a categorical denial by the Board that Letters of Registration exempted the holders thereof from the provisions of Section 401. Not only does the Board lack power to effect such an exemption without appropriate findings in the case of each applying carrier, but also the Letter of Registration did not purport to do more than exempt the air carrier who received it insofar as his operations were irregular.

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[16] 6 CAB 1049 (1946).

II.

THE DISTRICT COURT WAS COMPETENT TO PASS ON THE ISSUE PRESENTED; IT IS NOT WITHIN THE PRIMARY JURISDICTION OF THE BOARD.

A. A court is competent to construe the regulations of an administrative board.

We are not here concerned with the question whether the construction of the regulation in this instance is the type of question the Board should decide, but rather whether the nature of an administrative regulation requires a court to refrain from construing it.[17] For purposes of this discussion, we use "regulation" to mean——

> an agency statement of general * * * applicability and future effect designed to implement, interpret, or prescribe law or policy * * *[18]

Section 292.1 of the Economic Regulations, being generally applicable to all irregular air carriers and governing their future action, falls within this definition. In dealing with the question of the power of a court to construe an administrative regulation, it is fitting to deal also with Trans-Pacific's suggestion that the Board could apply its regulation differently to Trans-Pacific than it has in the past to other carriers

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[17]In its Brief, p. 34, Trans-Pacific appears to take the position that construction of an administrative regulation is a function solely of the promulgating board.

[18]See Administrative Procedure Act, sec. 2(c), 5 U.S.C. Supp. 1001(c); for our purposes "rule" means a statement of particular as distinct from general applicability.

claiming exemption.[19] This is true because the leading cases where courts have construed administrative regulations have been cases where the court has held that regulations are adopted in the exercise of a delegated legislative power, and therefore, like statutes must be applied equally in all instances. This is a sound protection against discrimination within the administrative process. If an agency can exercise the delegated power to make general regulations governing future conduct with only a legislative hearing wherein all persons affected need not be heard, due process and protection of individuals affected require that the published regulation be construed the same for all, despite privilege or hardship in special cases.[20]

A case bearing on the problem is *Columbia Broadcasting System v. United States.*[21] There the Federal Communications Commission by regulation which it termed an "announcement of policy" ruled that it would refuse licenses to radio stations which entered into certain defined types of contract with any broadcasting network. In dealing with the Government's assertion that this regulation was not an "order"

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[19]Appellant's brief, pp. 35, 41. In this connection it is interesting to note that in *Investigation of Non-Scheduled Air Services,* 6 CAB 1049, the Board refers to the page (6 CAB 1061) and *Trans-Marine* (6 CAB 1071) cases as "a guide to other operators in ascertaining for themselves whether they are covered by the exemption order or should discontinue the services until an appropriate certificate of public convenience and necessity is obtained."

[20]*Assigned Car* Cases, 274 U.S. 564 (1927).

[21]316 U.S. 407 (1942); see also *Kraus & Bros. v. U. S.*, 327 U.S. 614 (1946).

under the Urgent Deficiencies Act, Mr. Chief Justice Stone said:

> Unlike an administrative order or a court of judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceedings, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms are addressed.[22]

Holding that the regulation was an "order" within the meaning of the Urgent Deficiencies Act, the court proceeded to rule against the Government's assertion that its regulation was an "announcement of policy" which should be treated like a press release, saying——

> When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command * * * they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the commission and all others whose rights may be affected by the commission's execution of them.[23]

Similarly the Supreme Court has overturned an administrative decision where the administrator failed to follow his own Rules of Practice in a particular hearing, even though the administrator had acted properly according to his own interpretation of the rules.[24]

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[22]Id. 316 U.S. at 418.
[23]Id. p. 422.
[24]*Bridges v. Nixon,* 326 U.S. 135 (1945).

And the court has upheld the contention of a railroad that the ICC misconstrued its own regulation in allowing a reparations award.[25]

These are a few of the many cases demonstrating that no peculiar sanctity inheres in administrative regulations which renders them free from judicial construction. They are promulgated in the exercise of a delegated legislative power to govern the future actions of persons affected. They have the force of law, but the public must know what is expected of it. This knowledge can only come from a determination of the meaning and intendment of the words of the regulation as published. Should a dispute arise over the proper construction, the arbiter of their meaning is the court, unless a rule of judicial self-restraint such as the doctrine of primary jurisdiction or exhaustion of remedy, leads the court to decline to accept jurisdiction. And the promulgating body is bound by its own regulation as reasonably interpreted unless and until it shall have amended the regulation by proper administrative action.

In the instant case, the mere fact that the District Court was called upon to construe Regulation 292.1 did not require him to eschew his statutory jurisdiction over the action. Nor should he have been dissuaded from deciding the case by Trans-Pacific's assertions that the Board might construe the regulation differently with respect to its operations, for, as we have seen, the Board is bound by the reasonable

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[25]*Brown Lumber Co. v. Louisville and Nashville R.R.*, 299 U.S. 393 (1937).

meaning of the regulation for all purposes and in all cases.

B. The issues involved here were properly decided by the District Court without reference to the Board.

In its brief, Trans-Pacific has set forth at length the origin and development of the doctrine of primary jurisdiction. The doctrine was developed principally in the field of determination of reasonableness of rates charged by common carriers, and requires a court to withhold action until the appropriate administrative body has decided what rate is reasonable. The fundamental purpose is to preserve uniformity of regulation pursuant to the Congressional purpose in establishing the regulatory bodies.[26] The doctrine has since been extended to cases relating to discriminatory practices of regulated industries,[27] in cases where (1) the governing statute gives the regulatory body jurisdiction,[28] and (2) the nature of the question presented requires consideration of complex facts relating to the regulated industry, requiring determination by the expert administrative board primarily concerned therewith. Thus it is that Justice Brandeis defines

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[26]*Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); this case is generally regarded as the landmark in the field.

[27]*United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *Robinson v. B. & O. R.R.*, 222 U.S. 506 (1912).

[28]Compare *Adler v. Chicago & Southern Air Lines*, 41 F. Supp. 366 (1941) with *Schwartzman v. United Air Lines Transp. Corp.*, 6 FRD 517 (1947) as to when action of a regulated company is a "'practice' over which the administrative board would have jurisdiction. The *Schwartzman* case contains an excellent review of the development of the doctrine of primary jurisdiction.

the bounds of administrative and judicial activity in the following oft-quoted phrases:

> Wherever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission.[29]

In the foregoing case, Mr. Justice Brandeis apparently makes the application of the doctrine depend upon whether the "controverted question" is one of "fact" or "law". There is no fixed distinction between these types of questions.

> Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.[30]

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[29] *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

[30] Dickinson, Administrative Justice and the Supremacy of Law in the United States (1927) p. 55.

A learned authority on the development of administrative law has indicated that the line should be drawn between those issues requiring expert analysis by persons experienced in the industry concerned, and those issues wherein the courts have traditionally been expert.[31]

Did the court below decide an issue of fact or an issue of law? Was there any aspect of the problem whether Trans-Pacific fell within the class of carriers exempted by Regulation 292.1 which required administrative discretion or expertise? We have already shown that the Board could not in its discretion reinterpret the regulation to exempt Trans-Pacific if the regulation did not in its plain language effect that exemption.[32]

The District Court was called upon to determine whether Trans-Pacific was an air carrier operating without a certificate. The court had express statutory jurisdiction over this matter. But Trans-Pacific asserted an exemption under the Board regulation, claiming it was an "irregular air carrier". Was the jurisdiction of the court ousted by this assertion, or could the court decide the question whether Trans-

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[31]Landis, The Administrative Process (1938) p. 152. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide."

[32]Trans-Pacific could have and did apply for an individual exemption order which the Board had power to grant under Section 416(b)(1) of the Act. That petition is of record in Docket No. 2390 before the Civil Aeronautics Board.

Pacific was exempt from the mandatory provisions of Section 401(a)? We submit that the court manifestly had and properly retained jurisdiction to decide this matter.

The issue presented involves no question of reasonableness or discrimination in rates or practices of the carrier. Such issues comprise the bulk of matters with which the Board as the regulatory body is better equipped to deal. The question is one of application of the Board's regulation. The validity of the regulation is not called into question. The court had to determine whether Trans-Pacific had "held itself out to the public", as operating "with a reasonable degree of regularity" between designated points. Irregularity of service exists where "services offered and performed * * * are of such infrequency as to preclude an implication of a uniform pattern."[33]

The question of whether Trans-Pacific held out or represented to the public that it carried on a particular type of service is the same question with which courts traditionally treat when they decide whether a carrier is or is not a common carrier.[34]

The Board has recognized that the "holding out" within the meaning of their regulation is the same as

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[33]Section 292.1(b), Economic Regulations, 12 Fed. Reg. 3077.

[34]Common carrier is defined as one who holds himself out to the public as ready and willing to undertake for hire the transportation of passengers or property from place to place. *Stimson Lumber Co. v. Kuykendall,* 275 U.S. 207, 211 (1927); *Texas & Pac. Ry. v. Gulf, C.&S.F. Ry.,* 270 U.S. 266 (1926); *Blumenthal v. United States,* 88 F. (2d) 522, 528 (CCA 8th 1937); *Alaska Air Transport Inc., and Marine Airways* d/b/a *Alaska Coastal Airlines v. Alaska Airplane Charter Co.,* 72 F. Supp. 609 (1947).

the traditional common carrier test.[35] The District Court was clearly competent to decide this part of the question. What of the issue of irregularity? The regulation itself in unambiguous language indicates that frequency and pattern of operation excludes a carrier from the exemption. Can the court determine when such frequency and pattern exists? We submit it can. No expert knowledge is required to determine that an airline has been operating a "daily scheduled regular service" (R. 14). The complexities of national air transportation are not involved in making this determination. Expert consideration by the Board is not required. In addition to the explicit definition contained in the regulation, the Board has declared certain standards of interpretation of its regulation. In the *Investigation of Non-Scheduled Air Carriers,*[36] the Board refers to the *Page,*[37] and *Trans-Marine,*[38] cases as guides—

> to determine if the services conducted by the carriers involved were within the terms of the exemption order.

And the Board set forth in the Explanatory Statement on Revision of Section 292.1 of the Economic Regulations an order entered by the Board in the *Matter of the Non-Certificated Operations of Trans-Carribbean Air Cargo Lines, Inc.*[39]

> from which further guidance as to the extent of permissible operations may be obtained.

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[35]*Page Airways, Inc., Investigation,* 6 CAB 1061, 1067 (1946).
[36]6 CAB 1049, 1054 (1946).
[37]6 CAB 1061 (1946).
[38]6 CAB 1071 (1946).
[39]Docket No. 2593.

This order formed the basis for the injunction issued by the District Court in the instant case (R. 21). Similar orders were issued in *Willis Air Service, Inc.*[40] and *Trans-Luxury Airlines, Inc.*[41]

In the foregoing cases, the Board has carefully and consistently interpreted its own regulation. We have no quarrel with its interpretation. We insist that the District Court has the right to make the same interpretation, particularly in the light of the express mandate of judicial enforcement when Section 401(a) of the Act is violated.

The significance of the fact that in this case, appellee asserts the validity of the published regulation of the Board rather than challenges its reasonableness and merely asks that the court apply the regulation in exercising its statutory jurisdiction under Section 1007 is illustrated by the cases concerned with coal car allocations by railroads. Where a coal operator alleged that the carrier had, by adopting an allocation rule, discriminated against him, the Supreme Court held that the operator must seek his remedy before the ICC.[42] The issue of propriety of the rule was primarily administrative.

But where the coal operator alleged that the railroad had failed to comply with the rule, the court held that it had jurisdiction to force the carrier to abide

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[40]Docket No. 2639.

[41]Docket No. 2589.

[42]*Baltimore & Ohio R. Co. v. United States ex rel., Pitcairn Coal Co.*, 215 U.S. 481 (1910). Accord: *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304 (1913).

by the published rules.[43] In construing and enforcing this rule, the court had to determine how the carrier was distributing its cars, what the coal output of the plaintiff was, and that of its competitors, and whether the plaintiff was getting his proper share of cars under the rule. Yet it was held that these questions required no administrative expert to decide them and that uniformity could be maintained by court construction and application.

So, too, in *Great Northern Ry. v. Merchants Elevator Co.*,[44] wherein Mr. Justice Brandeis wrote his landmark opinion, the court approved judicial determination whether corn held at the destination named in the bill of lading for inspection whereupon disposition orders were given and original bills of lading surrendered in exchange for new billing to the ultimate destination had been, "diverted, reconsigned or reforwarded" within the meaning of Rule 10 of the tariff or whether the situation was within exception (a) as having been held "for inspection and disposition orders incident thereto."

The court said:[45]

> Here no fact, evidential or ultimate, is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense

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[43]*Penna. R.R. v. Puritan Coal Co.*, 237 U.S. 121 (1915). Accord: *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U.S. 275 (1915).

[44]259 U.S. 285 (1922).

[45]Ibid. p. 294.

> and to apply the meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary.

The court should note that construction of the rule in the *Great Northern* case required the court to deal with terms which, though used in their ordinary sense, were nevertheless technical words in the transportation industry. On the other hand, the District Court in the present case found it necessary to construe the words "regular" "irregular" "infrequency" "pattern" all of which were words of general usage. And by the Board's own interpretations, it is apparent that they were used in their usual and ordinary meaning.

In *Brown Lumber Co. v. Louisville and Nashville R. Co.*,[46] a shipper brought an action for overcharges before the Interstate Commerce Commission. The Commission construed the railroad's tariff to require the so-called "combination rule" to be applied to determine the rate payable by the shipper, and order reparations. The railroad refused to comply. The shipper brought an action in the District Court. The railroad demurred, and its demurrer was sustained in the lower court and on appeal on the ground that the Interstate Commerce Commission had misconstrued the tariff. A proper construction prevented the aplication of the "combination rule." Overruling the shipper's contention that preliminary resort to the

[46]299 U.S. 393 (1937).

Commission was necessary and its construction conclusive, because application of the rule involved administrative discretion and determination of reasonableness of the practice,[47] the court said:

> To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters.[48]

The foregoing cases, and the instant case differ significantly from *Texas and Pacific Ry. Co. v. American Tie and Lumber Co.*[49] There the question was whether oak railroad cross-ties were included within the terms "lumber, all kinds (except walnut and cherry)" in the published tariff of the carrier, or whether they were, as the carrier alleged, "a separate and distinct and well recognized freight commodity."

This issue was not one of construction, but rather a question whether a usage prevailed in the railroad and lumber businesses, which gave a peculiar meaning to the word "lumber" in the tariff. The court held that the Interstate Commerce Commission must determine that question.

In the present case, the words of Section 292.1 of the Board's Economic Regulations are clear and unambiguous. They are non-technical words. Their meaning is not to be derived from the complexities of the national air transportation system. Their ordinary

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[47]Cf. Trans-Pacific's contention, Brief, pp. 34-35.
[48]299 U.S. 393, 398, per Brandeis, J.
[49]234 U.S. 138 (1914).

meaning is to be applied to undisputed facts. The District Court was competent to determine whether Trans-Pacific had brought itself within the class of "irregular air carriers" exempted in the Regulation. Since Trans-Pacific failed to do so, the court was bound to exercise its statutory jurisdiction to enjoin the illegal operations at the suit of a party in interest.

Significantly, the Board in its brief as *amicus curiae* before the District Court did not claim that determination of the question whether Trans-Pacific was an "irregular air carrier" required its expert administrative judgment. On the contrary, the Board merely set forth the words of the regulation, and one of its orders issued pursuant thereto, and stated—

> If the defendant is found to have conducted daily air transportation service as alleged, or any otherwise reasonably regular service between the same two or more points, such service would exceed in frequency and regularity those operations permitted under Section 292.1 and accordingly would not be authorized thereby.

The District Court in the present case applied the common words of the Board's regulation in their ordinary meaning to determine that Trans-Pacific was not within the class exempted thereby, and then exercised its normal equity jurisdiction as expressly authorized and directed to do by Congress in Section 1007 of the Act to enjoin unlawful competition by an uncertificated carrier. The District Court would have erred had it refused to entertain jurisdiction.

We submit that the decree below should be affirmed.

Dated, Honolulu, Hawaii,
November 3, 1948.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

STATUTORY PROVISIONS.

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Definitions

Section 1. As used in this Act, unless the context otherwise requires—

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: * * *

(10) "Air transportation" means interstate, overseas or foreign air transportation * * *

* * * * * * *

(21) "Interstate air transportation" * * * means the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce * * * (a) * * * between places in the same territory * * * of the United States * * * whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(27) "Person" means any individual, firm, copartnership, corporation, company * * * (52 Stat. 973, 49 U.S.C. 401).

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Section 401(a). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * * (52 Stat. 987, 49 U.S.C. 481(a)).

CLASSIFICATION AND EXEMPTION OF CARRIERS

Section 416 * * *

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may * * * exempt from the requirement of this title (IV) or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier, or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. (52 Stat. 1004, 49 U.S.C. 496(b)).

JUDICIAL ENFORCEMENT.

Section 1007. (a) If any person violates any provision of this Act, * * * the Board, its duly authorized

agent, or, in the case of a violation of section 401(a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act * * *; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees and representatives, from further violation of such provision of this Act * * * and enjoining upon them obedience thereto (52 Stat. 1025, 49 U.S.C. 647 (a)).

Section 292.1 of the Economic Regulations
(12 Fed. Reg. 3076)

Irregular Air Carriers

(a) *Applicability.* This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(b) *Classification.* There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers". An Irregular Air Carrier shall be defined to mean any air carrier

(1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.* Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

* * * * * * *

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.* From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided,* That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.* Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizen-

ship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.* A Letter of Registration shall be non-transferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.* Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.* Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.